Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

GEORGE C. PUCKETT, JR. and MARTHA SUE PUCKETT,

Petitioners,

v.

COMMISSIONER OF THE INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PERCY L. "WAYNE" ISGITT
LAW OFFICES OF
PERCY L. "WAYNE" ISGITT, P.C.
Attorney for Petitioners
4801 Woodway, Ste. 430W
Houston, TX 77056-1885
(713) 572-7678

162156 Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Does a confirmed Chapter 11 bankruptcy plan of reorganization operate: (1) to conclusively establish nondischargeable tax liabilities, and (2) to bar under the doctrine of res judicata a taxpayer's net operating loss deductions specifically allowed and exempted from the application of res judicata by the Internal Revenue Code?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Citations of Opinions and Orders	1
Statement of Basis for Jurisdiction	1
Pertinent Statutes	1
Statement of the Case	5
Reasons for Granting the Writ	6
I. A Confirmed Plan Does Not Fix Nondischargeable Tax Liabilities.	7
II. A Confirmed Bankruptcy Plan Does Not Bar Net Operating Loss Deductions Under The Doctrine Of Res Judicata.	10
III. NOL Carryovers And Carrybacks Subsequent To Bankruptcy Proceedings Are Statutorily Provided For.	12
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizona v. California, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (U.S. 2000) 11

Balbirer v. Austin, 790 F.2d 1524 (11th Cir. 1986) 11, 12

Cromwell v. County of Sac, 94 U.S. 351 (1876) ... 11

Fein v. United States, 22 F.3d 631 (5th Cir. 1994) 8

Internal Revenue Service v. Taylor (In re Taylor), 132 F.3d 256 (5th Cir. 1998) 7, 8

Simmons v. Savell (In re Simmons), 765 F.2d 547 (5th Cir. 1985) 8

United States v. Gurwitch (In re Gurwitch), 794 F.2d 584 (11th Cir. 1986) 8

United States v. International Building Co., 345 U.S. 502, 73 S. Ct. 807, 97 L. Ed. 1182 (1953) ..10, 11, 14

United States v. Shanbaum, 10 F.3d 305 (5th Cir. 1994) 10

Cited Authorities

Page

Statutes:

11 U.S.C. § 505 8

11 U.S.C. § 505(a)(1) 1, 6, 7

11 U.S.C. § 507(a)(8)(A) 2, 8

11 U.S.C. § 523 ..... 8, 9

11 U.S.C. § 523(a)(1)(A) 2, 8

11 U.S.C. § 1141(b) 2, 12, 13

11 U.S.C. § 1141(d) 8

11 U.S.C. § 1141(d)(2) 3, 8

26 U.S.C. § 1398 13

26 U.S.C. § 1398(g) 3, 12, 13

26 U.S.C. § 1398(i) 3, 12, 13

26 U.S.C. § 6511(a) 4, 7

26 U.S.C. § 6511(d)(2)(A) 4, 7

Cited Authorities

	Page
26 U.S.C. § 6511(d)(2)(B)(iii)	5, 10, 13
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	6
28 U.S.C. § 1331	6
28 U.S.C. § 1346(a)(1)	6
I.R.C. § 172	12
Rule:	
Fed. R. Civ. P. 12(b)(6)	6

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed April 12, 2000 ..... 1a

Appendix B — Memorandum And Opinion And Judgment Of The United States District Court For The Southern District Of Texas, Houston Division Dated June 22, 1999 And Entered June 23, 1999 ..... 11a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Dated And Filed June 12, 2000 ..... 29a

CITATIONS OF OPINIONS AND ORDERS

Puckett v. Commissioner of the Internal Revenue Service, 213 F.3d 636 (5th Cir. 2000) (App. A.)

Puckett v. United States, 82 F. Supp. 2d 660 (S.D. Tex. 1999). (App. B.)

STATEMENT OF BASIS FOR JURISDICTION

The Petitioners seek review of the judgment of the Fifth Circuit Court of Appeals entered on April 12, 2000, for which a motion for rehearing was denied on June 12, 2000. (App. C.) 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a writ of certiorari the judgment in question.

PERTINENT STATUTES

11 U.S.C. § 505(a)(1):

> Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. § 507(a)(8)(A):

(a) The following expenses and claims have priority in the following order:

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts

11 U.S.C. § 523(a)(1)(A):

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

(1) for a tax or a customs duty —

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

11 U.S.C. § 1141(b):

Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. § 1141(d)(2):

> The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

26 U.S.C. § 1398(g), as in effect at the time of the Pucketts' bankruptcy case and plan confirmation:

> (g) ESTATE SUCCEEDS TO TAX ATTRIBUTES OF DEBTOR. — The estate shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor —
>
> (1) NET OPERATING LOSS CARRYOVERS. — The net operating loss carryovers determined under section 172.

26 U.S.C. § 1398(i), as in effect at the time of the Pucketts' bankruptcy case and plan confirmation:

> (i) DEBTOR SUCCEEDS TO TAX ATTRIBUTES OF ESTATE. — In the case of a termination of an estate, the debtor shall succeed to and take into the items referred to in paragraphs (1), (2), (3), (4), (5), and (6) of subsection (g) in a manner similar to that provided in such paragraphs (but taking into account that the transfer is from the estate to the debtor instead of from the debtor to the estate).

26 U.S.C. § 6511(a):

(a) PERIOD OF LIMITATION ON FILING CLAIM. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

26 U.S.C. § 6511(d)(2)(A):

(A) PERIOD OF LIMITATION. If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in subsection (b)(2) or (c),

whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback.

26 U.S.C. § 6511(d)(2)(B)(iii):

(iii) DETERMINATIONS BY COURTS TO BE CONCLUSIVE. — In the case of any such claim for credit or refund or such application for a tentative carryback adjustment, the determination by any court, including the Tax Court, in any proceeding in which the decision of the court has become final, shall be conclusive except with respect to —

(I) the net operating loss deduction and the effect of such deduction, and . . .

STATEMENT OF THE CASE

The Petitioners, George C. Puckett, Jr. and Martha Sue Puckett (the "Pucketts") filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code on July 8, 1987. The Internal Revenue Service (the "IRS") timely asserted claims in the Pucketts' bankruptcy proceeding for income and employment taxes.[1] The Pucketts' chapter 11 plan was confirmed on April 19, 1991, and treated the IRS' claims as allowed unsecured priority claims and allowed unsecured claims. The amount of the IRS' claims was undisputed, and no claim objection was filed by the Pucketts. Neither the

1. The employment taxes were paid in the Pucketts' bankruptcy case, and are not at issue in this petition for writ of certiorari.

IRS nor the Pucketts sought a tax determination as provided by 11 U.S.C. § 505(a)(1).

The Pucketts subsequently amended their 1985, 1986, 1987, and 1988 federal income tax returns on June 30, 1994, asserting in part, refund claims resultant from a prepetition net operating loss ("NOL") deduction carryover from 1984 and a postpetition NOL deduction carryback from 1989. The 1985, 1986, 1987, and 1988 taxes had been paid through the bankruptcy proceedings on June 30, 1992, or exactly two years prior to the refund claim being asserted.

The IRS ultimately denied the refund claims on the basis that the Pucketts' confirmed chapter 11 plan operated to bar the claims under the doctrine of res judicata. The Pucketts exhausted their administrative remedies, and brought suit in federal district court, alleging jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a)(1). The district court dismissed the Pucketts' complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the confirmed chapter 11 plan precluded the refund claims, also premised on the doctrine of res judicata. The Fifth Circuit Court of Appeals, exercising its jurisdiction pursuant to 28 U.S.C. § 1291, affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' application of the doctrine of res judicata in this case directly conflicts with decisions of this Court, and with decisions of the Eleventh Circuit Court of Appeals. The appellate court's holding further discards essential limitations on the preclusive effect of res judicata in a manner that contravenes important and relevant decisions of this Court.

I.

A CONFIRMED PLAN DOES NOT FIX NONDISCHARGEABLE TAX LIABILITIES.

The Fifth Circuit Court of Appeals concluded that the Pucketts' failure to invoke a § 505(a)(1) determination of their tax liabilities or object to the IRS' claim for the subject tax years during the course of the bankruptcy case firmly fixed the amount of their tax liabilities. In reaching this decision, the Court of Appeals correctly noted that the NOL deductions existed during the pendency of the Pucketts' Chapter 11 case. The Court of Appeals reasoned that because the Pucketts failed to avail themselves to the NOL deductions prior to plan confirmation, that the deductions were forever lost, even though the Pucketts timely brought a refund claim predicated on the NOL deductions. 26 U.S.C. § 6511(a) and 26 U.S.C. § 6511(d)(2)(A). The logic applied by the Court of Appeals is flawed and contrary to the decisions of the Eleventh Circuit Court of Appeals in that the mere confirmation of the Pucketts' chapter 11 plan did not irrevocably establish the amount of their tax liabilities, nor did it bar the availability of the NOL deductions.

Generally, a debtor in a bankruptcy proceeding has two available avenues by which to contest a tax claim: a claim objection, or for the debtor or the IRS to move the bankruptcy court for a determination pursuant to 11 U.S.C. § 505(a)(1). *Internal Revenue Service v. Taylor (In re Taylor)*, 132 F.3d 256, 262 (5th Cir. 1998). It is undisputed that the Pucketts did not contest the claim of the IRS in the bankruptcy proceeding, nor did the Pucketts or the IRS seek a § 505(a)(1) determination.

Unlike an objection to a proof of claim, the filing of a plan does not generally initiate a contested matter with respect to a particular claim. *Taylor*, 132 F.3d at 261, citing *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 552 (5th Cir. 1985). To the contrary, "the plan is like a proof of claim to which objections are filed, thereby instituting contested matters, rather than a vehicle through which objections are made . . . The Code and the Rules do not envision the use of a Plan as a means for objecting to proofs of claims." *Id.*

The *Taylor* court observed that the IRS has the option of remaining outside the bankruptcy proceeding altogether, while preserving claims for debts excepted from discharge, whether or not a claim for such tax was filed or allowed. *Taylor*, 132 F.3d at 261; 11 U.S.C. § 1141(d); 11 U.S.C. § 523(a)(1)(A); 11 U.S.C. § 507(a)(8)(A).

The Bankruptcy Code makes clear in 11 U.S.C. § 1141(d)(2) that the confirmation of a plan of reorganization does not fix tax liabilities made nondischargeable under 11 U.S.C. § 523. *United States v. Gurwitch (In re Gurwitch)*, 794 F.2d 584, 585 (11th Cir. 1986); *Fein v. United States*, 22 F.3d 631, 633 (5th Cir. 1994). Similarly, the confirmation of a plan does not substitute for a § 505 motion any more than it substitutes for an objection to a proof of claim. *Taylor*, 132 F.3d at 263. "The confirmation of a *plan does not itself invoke the tax determination process*". [emphasis supplied] *Id.*

In the case at bar, the Pucketts' tax liabilities consist of federal income taxes, including interest and penalties thereon. These tax liabilities are nondischargeable under 11 U.S.C. § 523(a)(1)(A). In addition, the Pucketts' confirmed chapter 11 plan treated the IRS' claims as nondischargeable. The federal

income taxes were classified as a Class 3 Claim, subject to the following provision:

> TO THE EXTENT THAT THE CLASS 3 CLAIM IS NOT PAID IN FULL, THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ANY UNPAID BALANCE.

The interest and penalties on the unpaid federal income taxes were classified as a Class 7 Claim, and subjected to the following treatment, in anticipation that no funds would be available to satisfy the Class 7 Claim:

> THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ALL PENALTIES AND THE INTEREST OWING THEREON WHICH ARE ATTRIBUTABLE TO THE DEBTOR'S [sic] PRE-PETITION FEDERAL INCOME TAXES AND FEDERAL WITHHOLDING TAXES AND INCLUDED IN THIS PLAN AS A CLASS 7 CLAIM.

Therefore, the Pucketts' tax liabilities were clearly nondischargeable pursuant to 11 U.S.C. § 523, and the Court of Appeals erred in concluding that the liabilities were fixed solely by virtue of plan confirmation.

II.

A CONFIRMED BANKRUPTCY PLAN DOES NOT BAR NET OPERATING LOSS DEDUCTIONS UNDER THE DOCTRINE OF RES JUDICATA.

Res judicata bars the relitigation of issues which were raised or could have been raised in a prior adjudication on the merits by a court of competent jurisdiction. *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). The Pucketts' claims consist of an NOL carryover and NOL carryback. The Pucketts do not dispute the underlying tax liabilities for the subject tax years, but simply seek a reduction in their substantial tax liability by application of a NOL deduction as provided by statute. 26 U.S.C. § 6511(d)(2)(B)(iii).

In the seminal case concerning res judicata and federal income tax issues, this Court held that a judgment in the prior action operates as an estoppel only as to the actual issues or points in controversy, and upon which the findings or verdict was rendered. *United States v. International Building Co.*, 345 U.S. 502, 505, 73 S. Ct. 807, 808-09, 97 L. Ed. 1182 (1953). In that case, the IRS assessed deficiencies against a taxpayer for the taxable years 1933, 1938, and 1939, alleging that the taxpayer had claimed an excessive basis for depreciation. *Id.* at 503. After the taxpayer filed for bankruptcy, however, the IRS and the taxpayer stipulated in the pending Tax Court proceedings that there was no deficiency for the taxable years in question, and the Tax Court entered a formal decision to that effect. *Id.* at 503-04. Subsequently, the IRS assessed deficiencies for the years 1943, 1944, and 1945, and the taxpayer defended on the ground that the earlier Tax Court decision was preclusive on the issue of the correct basis for depreciation. *Id.* The

court declined to apply res judicata principles, and noted the governing principle as set forth in *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876).

> In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The *International Building* Court concluded that unless there was an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. *International Building*, 345 U.S. at 506. This Court recently applied the same principles enumerated in *International Building*, as being illustrative of the application of res judicata. *Arizona v. California*, 120 S. Ct. 2304, 2313, 147 L. Ed. 2d 374, 384 (U.S. 2000). Thus, unless the court conducts an actual adjudication on the merits, res judicata cannot be used as an absolute bar to issues which might have been litigated.

Similarly, the Eleventh Circuit Court of Appeals held that a bankruptcy court failed to make adequate inquiry into issues actually resolved by prior state court litigation, and thus a preclusive effect could not be accorded to the state court judgment until a full inquiry was made determining what issues were actually resolved by that judgment. *Balbirer v. Austin*, 790 F.2d 1524, 1525 (11th Cir. 1986). In direct

conflict with the decisions of this Court, and the Eleventh Circuit's holding in *Balbirer*, the Fifth Circuit Court of Appeals has given a broad-sweeping preclusive effect to a confirmed bankruptcy plan, in the complete absence of litigation or controversy.

In the instant case, no inquiry was made into the merits. The IRS filed claims without objection, and the chapter 11 plan was confirmed. In fact, no justiciable controversy existed. The Pucketts do not dispute the underlying tax liabilities; they simply seek the benefit of a timely-asserted NOL deduction as allowed by statute.

III.

NOL CARRYOVERS AND CARRYBACKS SUBSEQUENT TO BANKRUPTCY PROCEEDINGS ARE STATUTORILY PROVIDED FOR.

26 U.S.C. § 1398(g), as in effect at the time of the Pucketts' bankruptcy case and plan confirmation, provided that a debtor's bankruptcy estate succeeded to the tax attributes of the debtor, including net operating loss carryovers determined under section 172 of the Internal Revenue Code. Similarly, 26 U.S.C. § 1398(i), as in effect at the time of the Pucketts' bankruptcy case and plan confirmation, provided that upon the termination of the debtor's bankruptcy estate, the debtor would succeed to the tax attributes of the estate. Finally, 11 U.S.C. § 1141(b) provides in relevant part that except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

The plain language of the statutes cited above evidences a Congressional intent to legislate specific rules applicable to NOL carryovers for individual Chapter 11 debtors. Indeed, the opening section of § 1398 states that it applies to "any case under chapter 7 . . . or chapter 11 . . . of title 11 of the United States Code in which the debtor is an individual." Further, 11 U.S.C. § 1141(b) read in conjunction with 26 U.S.C. § 1398(i) makes clear that NOL carryovers become the property of the individual debtor upon termination of the Chapter 11 estate.

Congress indicated a further intent to treat NOL deductions differently from other tax attributes by the language of 26 U.S.C. § 6511(d)(2)(B)(iii), which reflects Congress' intent that the normally preclusive effect given to a court's prior adjudication does not apply with respect to NOL deductions. In essence, the legislature carved out an exception to the doctrine of res judicata with regard to NOL deductions. The Pucketts' refund claims premised on NOL deductions fall squarely within the statutorily-contemplated exception. Sections 1398(g) and 1398(i) provide for the orderly flow of tax attributes from the debtor to the estate and then back to the debtor upon termination of the estate, and specifically address the treatment of NOL deductions. The claims at issue center around a carryover of a 1984 NOL to apply against a 1985 tax liability, and a 1989 NOL carryback to extinguish a 1987 tax liability and reduce a 1988 tax liability. Whether or not the Pucketts' claimed NOL deductions could or should have been litigated within the bankruptcy case is not relevant in light of § 6511(d)(2)(B)(iii). The Pucketts seek a refund based on NOL deductions: § 6511(d)(2)(B)(iii) provides that no final decision of any court shall be conclusive with respect to NOL deductions.

More importantly, however, this Court has held that in the absence of an actual determination on the merits, res judicata may not bar issues which might have been litigated. *International Building*, 345 U.S. at 505-06. Thus, the Court of Appeals erred in holding that the Pucketts' confirmed bankruptcy plan operated to forever foreclose the availability of net operating loss deductions provided for by statute.

CONCLUSION

The Court of Appeals erred in holding that the confirmation of a bankruptcy plan conclusively determines the amount of a debtor's nondischargeable tax liabilities, and precludes the allowance of net operating loss deductions through the application of the doctrine of res judicata. Thus, the judgment of the Court of Appeals should be reversed and remanded.

Respectfully submitted,

PERCY L. "WAYNE" ISGITT
LAW OFFICES OF
PERCY L. "WAYNE" ISGITT, P.C.
Attorney for Petitioners
4801 Woodway, Ste. 430W
Houston, TX 77056-1885
(713) 572-7678

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 12, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20697

GEORGE C PUCKETT, JR; MARTHA SUE PUCKETT

Plaintiffs-Appellants

v.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
(H-98-CV-1788)

Before KING, Chief Judge, and REAVLEY and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants George C. Puckett, Jr. and Martha Sue Puckett appeal the district court's grant of judgment on

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the pleadings in favor of the Internal Revenue Service. On appeal, Plaintiffs-Appellants argue that the district court erred in dismissing their claim for injunctive relief, and in ruling that their tax refund claims were barred by res judicata. For the reasons stated below, we AFFIRM the judgment of the district court.

I. FACTUAL AND PROCEDURAL HISTORY

In July 1987, Plaintiffs-Appellants George C. Puckett, Jr. and Martha Sue Puckett (the "Pucketts") petitioned for Chapter 11 bankruptcy protection. In September 1990, Defendant-Appellee the Commissioner of the Internal Revenue Service (the "IRS") filed a proof of claim, which it amended in January and February 1991. The IRS asserted an administrative claim for $190,357.10 in post-petition tax liability for the years 1987, 1988, 1989, and 1990. The IRS also assessed a total of $158,879.67 in pre-petition tax liabilities for the years 1985 and 1986 as an unsecured priority claim. Finally, the proof of claim for pre-petition taxes also calculated that the Pucketts owed $160,647.48 in interest and penalties on their pre-petition taxes. The Pucketts did not object to either the IRS' original or amended proofs of claim.

The Pucketts submitted a First Amended Plan of Reorganization as Supplemented (the "Plan") in March 1991. The Plan specifically incorporated the tax liability averred by the IRS as allowed claims. The post-petition taxes (1987-1990) were treated as a Class 2 secured claim entitled to priority under 11 U.S.C. § 506. The Plan provided for full payment of this claim. Next, the pre-petition taxes were

categorized as a Class 3 claim with priority pursuant to 11 U.S.C. § 507(a)(7). The Plan provided that funds remaining after the payment of the Class 1, 2, and 4 claims would be applied to this claim. It further stated that "TO THE EXTENT THAT THE CLASS 3 CLAIM IS NOT PAID IN FULL, THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ANY UNPAID BALANCE." Debtors' First Amended Plan of Reorganization As Supplemented, at 7. Finally, the interest and penalties on pre-petition taxes were classified as a Class 7 unsecured claim under the Plan. Noting that no funds would be available to satisfy this claim after partial payment of the Class 3 claim occurred, the Plan declared:

> THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ALL PENALTIES AND THE INTEREST OWING THEREON WHICH ARE ATTRIBUTABLE TO THE DEBTOR'S [sic] PRE-PETITION FEDERAL INCOME TAXES AND FEDERAL WITHHOLDING TAXES AND INCLUDED IN THIS PLAN AS A CLASS 7 CLAIM.

Debtors' First Amended Plan of Reorganization, As Supplemented, at 9.

On April 2, 1991, the bankruptcy court entered a confirmation order. The order established a 30-day period during which objections to claims could be brought.

However, the Pucketts did not object to the IRS' proofs of claim within this period. In June 1992, the Pucketts delivered two checks to the IRS. One check, for $225,564.90, was submitted in satisfaction of the Class 2 administrative claim for post-petition taxes. The second, for $175,000, was applied to the Class 3 claim for pre-petition taxes. The remainder of the Class 3 claim, as well as the entire Class 7 claim for interest and penalties on pre-petition taxes, went unpaid.

In June 1994, the Pucketts filed amended tax returns for the years 1985 to 1988. The Pucketts claimed that a 1984 net operating loss ("NOL") carried forward from 1984 to 1985 and reduced their 1985 tax liability by $113,807; and that a 1989 NOL carried back from 1989 to 1987 and 1988 and reduced their tax liability for those two years by $82,243.[1] The IRS characterized the Pucketts' amended returns as a claim for tax adjustment, and denied the claim on the grounds of res judicata. The Pucketts appealed to the IRS appeals division, which in March 1998 likewise denied their claim.

The Pucketts subsequently filed suit in the United States District Court for the Southern District of Texas. The Pucketts' complaint sought (1) injunctive relief from collection efforts by the IRS, and (2) a refund on their 1985-88 income taxes.[2] In August 1998, the IRS filed an

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1. The Pucketts also claimed that deductions for business expenses reduced their 1986 tax liability by $64,607.

2. The Pucketts' complaint alleged numerous grounds for a refund. On appeal, they only assert that they are due refunds because of NOL carryover and carryback deductions applied to their tax liability for the years 1985, 1987, and 1988.

answer. The IRS then filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting, *inter alia*, that res judicata precluded the Pucketts' refund claim. The Pucketts filed a response to the IRS' 12(b)(6) motion, and also moved to strike the motion as untimely.

On June 22, 1999, the district court ruled on the parties' motions. The court converted the IRS' 12(b)(6) motion to a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which, the court found, obviated the Pucketts' motion to strike. The district court then considered the merits of the IRS' motion, and determined that res judicata barred the Pucketts' refund claim. The court did not address the Pucketts' claim for injunctive relief. The district court granted the IRS' motion for judgment on the pleadings and dismissed the Pucketts' case with prejudice. The Pucketts timely appeal.

II. DISCUSSION

On appeal, the Pucketts contend that the district court erred by failing to address their claim for injunctive relief,[3] and by dismissing their case with prejudice. The IRS reasserts that res judicata bars the Pucketts' refund claim, and argues that the Pucketts' claim is also time-barred.

We review a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) *de novo*. *See St. Paul*

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3. At oral argument, the Pucketts stated that they had entered into an agreement with the IRS that rendered moot the claim for injunctive relief. As a result, we do not address this claim.

Fire & Marine v. Convalescent Servs., 193 F.3d 340, 342 (5th Cir. 1999) (citing *St. Paul Ins. of Bellaire v. AFIA Worldwide Ins.*, 937 F.2d 274, 279 (5th Cir. 1991)). In our review, we look only at the pleadings, and accept all allegations contained within as true. *See id.* (citations omitted).

A. Res Judicata

A bankruptcy proceeding bars a later suit if (1) the parties are identical in the two actions; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) there was a final adjudication on the merits; and (4) the same cause of action was involved in both cases. *See Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992).

Our review of the record and of the relevant caselaw confirms that all four conditions are satisfied here. The Pucketts instituted both the bankruptcy proceeding and the refund action in the district court. The IRS, likewise, was a party to both actions. The agency was named as the defendant in the district court case, and became a party to the bankruptcy proceeding by participating as a creditor. *See Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987). Furthermore, the bankruptcy judge undoubtedly had jurisdiction to issue an order confirming their proposed plan of reorganization. It is well-settled, moreover, that a confirmation order issued by a bankruptcy court constitutes a final adjudication on the merits for the purposes of a res judicata analysis. *See Eubanks*, 977 F.2d at 17 0 (citing, *inter alia*, 11 U.S.C. § 1141(a) and *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938)). This court has also held that "an

order allowing a proof of claim is, likewise, a final judgment." *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993).

Finally, we consider whether the bankruptcy proceeding and the subsequent refund claim involve the same cause of action. We have stated that "one's total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation." *Finley v. United States*, 612 F.2d 166, 170 (5th Cir. 1980) (citing *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948)). Consequently, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year." *Sunnen*, 333 U.S. at 598. We therefore find that the four-part test has been satisfied.

Under the law of this circuit, however, res judicata does not apply unless a party could and should have brought its claims in the former proceeding. *See Eubanks*, 977 F.2d at 173 (citations omitted). Res judicata precludes a later claim if a party was aware of the claim at the time of the prior proceeding. *See id.* at 175. Furthermore, res judicata bars a cause of action implicated in a proof of claim during a prior bankruptcy proceeding, to which the party bringing the second action did not object. *See In re Baudoin*, 981 F.2d at 744; *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 872 (5th Cir. 1984); *see also In re Holly's, Inc.*, 172 B.R. 545, 567 (W.D. Mich. 1994), *aff'd*, 178 B.R. 711 (W.D. Mich. 1995).

Appendix A

The Pucketts do not contend that they were unable to bring their claim to reduce their 1985, 1987, and 1988 tax liability by applying carryover and carryback NOLs before the bankruptcy court. Our review of the record, furthermore, indicates that they had ample opportunity to do so. There is no allegation in the record that the facts from which the existence of the 1984 and 1989 NOLs were determined were not available to the Pucketts at the time that the IRS filed its amended proof of claim in 1991. In fact, the Pucketts had themselves ascertained that they had suffered a loss in 1984, and declared it on their timely-filed 1984 tax return. Moreover, the Pucketts do not deny that they could have contested the amount of tax liability assessed by the IRS by either objecting to the proofs of claim or requesting the bankruptcy court to determine the amount of tax pursuant to 11 U.S.C. § 505(a)(1).

In addition, the Pucketts should have brought their claim during the bankruptcy proceeding. The IRS had filed proofs of claim pursuant to Federal Rule of Bankruptcy Procedure 3003. Under 11 U.S.C. § 502(a), a claim is deemed allowed if no objection is filed. An allowed claim incorporated in a reorganization plan becomes binding upon the debtor once the plan has been confirmed. *See* 11 U.S.C. § 1141(a). It is undisputed that the Pucketts failed to object to the tax liability asserted in the proofs of claim, either before or after the confirmation order. Accordingly, we find that res judicata precludes the Pucketts' lawsuit. To find otherwise would undermine the claims allowance procedure of the bankruptcy courts, and grant the Pucketts an unjustified opportunity to relitigate their tax liability.

Appendix A

B. New Arguments on Appeal

The Pucketts submit two new arguments on appeal in support of the proposition that res judicata principles do not apply to NOLs. They contend that the confirmation order has no preclusive effect under 26 U.S.C. § 6511(d)(2)(B)(iii)(I), which provides that final court decisions are not conclusive with respect to "the net operating loss deduction and the effect of such deduction." The Pucketts also assert that NOLs are contingent upon uncertain future events, and therefore do not constitute "justiciable controversies."

Because the Pucketts did not raise these arguments before the district court, we will not consider them on appeal unless they meet the plain error standard. *See Forbush v. J.C. Penney Co.*, 98 F.3d 817, 823 (5th Cir. 1996) (citing *U.S. v. Calverley*, 37 F.3d 160, 163 (5th Cir. 1994) (en banc)). Under this standard, we may exercise our discretion to correct a legal error that is clear or obvious and that affects substantial rights "if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc) (citing *U.S. v. Olano*, 507 U.S. 725, 736 (1993)).

We find that this standard has not been met with regard to either argument. The Pucketts have cited no authority for the proposition that failing to apply § 6511(d)(2)(B)(iii)(I) to NOL carryovers constitutes a clear error of law. Furthermore, it is questionable whether preventing the Pucketts from applying this subsection to the 1989 NOL

carryback would affect their substantial rights, given the time limitations established by § 6511(d)(2)(A). In any event, we are not persuaded that the error, if any, is such that the integrity of the judicial process would be compromised by our failure to correct it. We therefore find that the Pucketts have not shown plain error.

III. CONCLUSION

For the foregoing reasons, we AFFIRM.

APPENDIX B — MEMORANDUM AND OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 22, 1999 AND ENTERED JUNE 23, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-98-1788

GEORGE C. PUCKETT, JR. and
MARTHA SUE PUCKETT,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND OPINION

Plaintiffs, George C. Puckett, Jr. and Martha Sue Puckett (the "Pucketts"), seek a refund of federal income taxes they paid for tax years 1985 through 1988. Defendant, the United States, moves to dismiss under Rule 12(b)(6) based on the *res judicata* effect of the Pucketts' prior bankruptcy proceeding. Defendant asserts that the bankruptcy court's 1991 order confirming plaintiffs' chapter 11 plan of reorganization, which addressed the taxes due for the years at issue here, precludes this refund suit. Plaintiffs have

responded on the merits and have moved under Rule 12(f) to strike the motion to dismiss as untimely.

Based on a careful review of the motions and response, the pleadings, the parties' briefs and submissions, and the applicable law, this court DENIES plaintiffs' motion to strike and GRANTS the United States' motion to dismiss, for the reasons set out below.

I. Factual Background

Plaintiffs owned and operated a business of buying and selling used automobiles, as a sole proprietorship. In July 1987, plaintiffs filed for bankruptcy under chapter 11 of the Bankruptcy Code. When they filed their bankruptcy petition, plaintiffs had received extensions for, but had not filed, their federal income tax returns for 1985 and 1986.

In 1990, while the bankruptcy proceeding was pending, the Internal Revenue Service began to examine the Pucketts' 1985 and 1986 tax returns. On September 11, 1990, the IRS filed a proof of claim in the Pucketts' bankruptcy case. The IRS asserted that plaintiffs owed prepetition tax debts for the tax years 1985 and 1986; in amended proofs of claim, the IRS also asserted postpetition tax liabilities for the tax years 1987 and 1988. The IRS also filed objections to the Pucketts' proposed plan of reorganization. In a final amended proof of claim, filed on February 19, 1991, the IRS asserted that plaintiffs owed a prepetition tax debt of $319,527.15 and administrative costs for postpetition taxes in the amount of $201,533.97. (Docket Entry No. 11, Ex. 7).

Appendix B

Plaintiffs filed a First Amended Plan of Reorganization and an amended disclosure statement in the bankruptcy court on March 1, 1991. (Docket Entry No. 11, Ex. 8A-8B). In the amended statement and plan, the plaintiffs set out the IRS's tax claims without objection. The disclosure statement and plan provided for the payment of prepetition tax liability as a priority claim in the amount of $158,879.67; for the payment of penalties and interest on penalties as a general unsecured claim in the amount of $160,647.48; and for the payment of postpetition taxes in the amount of $190,356.10, under sections 503 and 1129(a)(9)(A) of the Bankruptcy Code. (Docket Entry No. 12, p.5, ¶13). The IRS dropped its claim for 1989 estimated income tax. *Id.*

Following a hearing, the bankruptcy court confirmed the plan on April 19, 1991. (Docket entry No. 11, Ex. 9). The Order Confirming Plan contained the following provisions:

> Prior to confirmation, the Debtors and the Internal Revenue Service entered into certain stipulations seeking to clarify, modify and amend provisions of the Plan, which modifications, clarification, and amendments do not constitute substantive alterations or modifications justifying notice of the proposed Plan.

Id. at ¶13.

> TO THE EXTENT THAT THIS CLASS 3 CLAIM IS NOT PAID IN FULL, THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY

Appendix B

> THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ANY UNPAID BALANCE. . . . THE INTERNAL REVENUE SERVICE MAY TAKE SUCH ACTIONS AS ARE AUTHORIZED BY THE INTERNAL REVENUE CODE TO ASSESS AND COLLECT ALL TAXES AND PENALTIES AND THE INTEREST OWING THEREON WHICH ARE ATTRIBUTABLE TO THE DEBTORS' PRE-PETITION FEDERAL INCOME TAXES AND FEDERAL WITHHOLDING TAXES AND INCLUDED IN THIS PLAN AS A CLASS 7 CLAIM.

Id.

A Postconfirmation Order and Notice entered May 1, 1991, set a deadline for filing objections to claims. (Docket Entry No. 11, Ex. 10). Plaintiffs filed no objections to the IRS's claims.

In June 1992, plaintiffs delivered two cashier's checks to the IRS, one for $225,564.90, for administrative claims, and one for $175,000, for priority claims. (Docket Entry No. 12, p.8, ¶27). Based on this payment, the IRS did not pursue its objection to the Pucketts' attorney fee application in the bankruptcy court, which was the IRS filed before it received payment. *Id.*

Two years later, in June 1994, plaintiffs filed four separate administrative claims for refund based on the treatment of business expenses and net operating losses

relating to Puckett Auto Sales. *Id.* at ¶28. Plaintiffs asserted a claim for refund of 1985 taxes based primarily on a 1984 net operating loss; a claim for refund of 1986 taxes based on changes to amounts claimed for business expenses; a claim for refund of 1987 taxes based on the use of a 1989 net operating loss carryback; and a claim for refund of 1988 taxes based in part on the use of a 1989 net operating loss carryback and in part on an adjustment to schedule C business expenses. *Id.* at p.8-9, ¶¶30-33.

In March 1998, the IRS refused the refund claims. This lawsuit resulted. On August 27, 1998, the United States filed its answer, raising *res judicata*, or claim preclusion, as an affirmative defense. (Docket Entry No. 5) On March 1, 1999, the United States filed a Rule 12(b)(6) motion to dismiss. (Docket Entry No. 12). The United States asserts that plaintiffs had a full and fair opportunity to litigate their tax liability for the years at issue in the bankruptcy court and are now barred under claim from relitigating such claims. On March 22, 1999, plaintiffs filed a Rule 12(f) motion to strike the United States' motion to dismiss because it was not filed prior to, or simultaneously with, the answer. (Docket Entry No. 15). Plaintiffs also filed a response on the merits. (Docket Entry No. 14).

The procedural and substantive issues are analyzed in turn.

II. The Rule 12(f) Motion to Strike

A motion to strike under Rule 12(f) serves to eliminate redundant, immaterial, impertinent, or scandalous matter in

pleadings. It is the primary mechanism for objecting to an insufficient defense. *See Plaza Assoc., Inc. v. Kolb Dev., Inc.*, No. Civ. A. 91-703, 1992 WL 78384 at *1 (E.D. La. April 9, 1992), *order vacated on other grounds by* No. Civ. A. 91-703, 1993 WL 165697 (E.D. La. May 10, 1993); *see also* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, at 644 (1990). A plaintiff moving to strike a portion of an answer must show that the challenged portion is "so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party." 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, at 650.

Some courts have refused to consider a Rule 12(f) motion to strike a motion to dismiss, noting that "a Rule 12(f) motion to strike only concerns striking matters from pleadings and a motion to dismiss is not a pleading." *O'Connor v. State of Nev.*, 507 F. Supp. 546, 548 (D. Nev. 1981) (citing *Hanraty v. Ostertag*, 470 F.2d 1096 (10th Cir. 1972), *aff'd by* 686 F.2d 749 (9th Cir. 1982); *see also Breier v. Northern Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963)). Other courts take a less stringent approach. *See, e.g., Rizzo v. Tyler*, 438 F. Supp. 895, n.1 (S.D.N.Y. 1977) (considering a motion to strike an untimely filed motion to dismiss on the merits); *Monroe v. Board of Ed. of Town of Wolcott*, 65 F.R.D. 641 (D.C. Conn. 1975) (although a motion to strike is not a strictly proper method of challenging affidavits, the court considered the basis of the challenge to the propriety of the affidavits.). Generally, motions to strike are viewed with disfavor, as a potentially dilatory tactic. *See*

Appendix B

5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, at 647. "Motions to strike affirmative defenses are not favored by the court, and before such a motion can be granted, the court must be convinced that there are no questions of fact and that any questions of law are clear and not in dispute, and that under no set of circumstances can the defense succeed." *Soanes v. Baltimore & O.R. Co.*, 89 F.R.D. 430, 431 n.1 (E.D.N.Y. 1981).

Considering the Pucketts' motion to strike on the merits, this court finds it unpersuasive. Under Rule 12(b)(6), a motion raising the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading. Rule 12(h)(2) provides, however, that the defense may be raised as late as trial. *See* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299-300. "Technically, 'a post-answer Rule 12(b)(6) motion is untimely and some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the failure to state a claim for relief.' " *Delta Truck & Tractor, Inc. v. Navistar International Transp. Corp.*, 833 F. Supp. 587, 588 (W.D. La. 1993) (citing 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299-300 (1990)). However, courts do not mechanically or routinely deny any motion made after a responsive pleading as untimely. If the defendant has previously included in the answer the defense raised in the motion, thereby giving notice, then courts generally allow Rule 12(b)(6) motions filed after the answer. In this context, the Rule 12(b)(6) motion becomes tantamount to a preliminary hearing under

Rule 12(d).[1] *See* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1361, at 445-446. The courts consider Rule 12(b)(6) motions to dismiss filed after a responsive pleading, not as a Rule 12(b) motion, but as a Rule 12(c) motion for judgment on the pleadings. *See Delta Truck & Tractor*, 833 F. Supp. at 588; *see also* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 at 301. However, a court applies the same standards to such a motion that are applied to motions timely filed under Rule 12(b)(6). *See Delta Truck & Tractor*, 833 F. Supp. at 588; *see also* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367, at 515-516.

In the present case, the United States filed its Rule 12(b)(6) motion after filing its answer to plaintiffs' complaint. However, the United States previously raised *res judicata* as an affirmative defense in its answer to plaintiffs' original complaint. This court may treat the United States' Rule 12(b)(6) motion as a Rule 12(c) motion for judgment on the pleadings and hear such motion under Rule 12(d). *See* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1361 at 445-446. The court will apply the same standard that applies under Rule 12(b)(6). *See Delta Truck & Tractor*, 833 F. Supp. at 588;

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1. Rule 12(d) provides that "upon application of any party, any of the defenses enumerated in Rule 12(b) that have been raised either by motion or in the answer or any of these defenses raised on a Rule 12(c) motion for judgment on the pleadings must be heard and determined, unless the court orders their consideration deferred until trial". *See* 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1373, at 547.

Appendix B

Barquin v. Roman Catholic Diocese of Burlington, Vermont, Inc., 839 F. Supp. 275, 278 n.1 (D. Vt. 1993); *Warner Co. v. Brann & Stuart Co.*, 198 F. Supp. 634, 636 (E.D. Pa. 1961).

Plaintiffs' motion to strike the motion to dismiss as untimely is without merit. This court DENIES plaintiffs' motion to strike the United States' motion to dismiss.

III. The Motion to Dismiss

A. The Applicable Legal Standards

Under Rule 12(b)(6), "a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). In a motion to dismiss, the allegations of the complaint must be accepted as true, *see Cruz v. Beto*, 405 U.S. 319, 322 (1972), and the complaint construed favorably to the pleader. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint need not outline all the elements of a claim, but it must be possible to draw an inference that these elements exist. *See Walker v. South Cent. Bell Telephone Co.*, 904 F.2d 275, 277 (5th Cir. 1990).

The Fifth Circuit has held that *res judicata*, or claim preclusion, bars a subsequent action if the following requirements are met: (1) the parties of the two suits are identical; (2) a final judgment was rendered by a court of competent jurisdiction; (3) there was a final judgment on

the merits; and (4) the same cause of action is involved in both suits. *See, e.g., Agrilectric Power Partners, Ltd. v. General Elec. Co.*, 20 F.3d 663, 664-665 (5th Cir. 1994); *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (citing *Stevenson v. International Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975)); *Lee v. Kroger Co.*, 901 F. Supp. 1218, 1222 (S.D. Tex. 1995).

B. Claim Preclusion and the Motion to Dismiss

The United States asserts that under the doctrine of claim preclusion, this refund action for the tax years 1985-1988 is barred because the bankruptcy court's order confirming the Amended Plan of Reorganization conclusively determined plaintiffs' tax liability for those years; plaintiffs filed no objections; and plaintiffs paid the taxes.

The parties do not dispute two of the elements of claim preclusion: the identity of the parties or the fact that the bankruptcy court was of competent jurisdiction. Plaintiffs do dispute that the bankruptcy court entered a final judgment on the merits and that the same cause of action is involved in both suits.

The IRS argues that both case law and statutory authority make the order confirming the amended plan of reorganization a final judgment in the bankruptcy proceeding. Section 1141(a) of the Bankruptcy Code provides:

> Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing

> securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

See also Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 480 (6th Cir. 1992) ("Confirmation of a plan of reorganization constitutes a final judgment in bankruptcy proceedings."); *Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358, 359 (5th Cir. 1972) ("An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court . . . and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of *res judicata*.") (citing *Stoll v. Gottlieb*, 305 U.S. 165, 170-171 (1938)); *Cromwell v. Sac County*, 94 U.S. 351, 352 (1876); *Eubanks v. FDIC*, 977 F.2d 166 (5th Cir. 1992); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987); *In re Constructors of Fla., Inc.*, 349 F.2d 595 (5th Cir. 1965).

Plaintiffs argue that there is an exception to this general rule, one that carves out a protective niche for tax claims. Plaintiffs assert that their refund claims arise from "certain non-dischargeable tax debts" in their chapter 11 bankruptcy case and are not barred by *res judicata*. (Docket Entry No. 14, p.2, ¶3). Plaintiffs rely on *In re Taylor*, 132 F.3d 256 (5th Cir. 1998). In *Taylor*, the Fifth Circuit held that the IRS

could pursue a claim for a penalty under 26 U.S.C. § 6672 outside the bankruptcy forum, even though the bankruptcy court had entered an order confirming the taxpayer's chapter 11 reorganization plan with a provision stating that the taxpayer had no tax liability. *Taylor*, 132 F.3d at 263. The Pucketts assert that the Fifth Circuit's statement in *Taylor*, that a chapter 11 order confirming a plan of reorganization does not itself invoke the tax determination process, should be interpreted to mean that both the IRS and taxpayers may pursue tax claims outside of the bankruptcy forum. Plaintiffs argue that "[i]t stands to reason, that if the United States may pursue certain tax claims outside the bankruptcy arena, then [plaintiffs] may certainly offset allowable deductions under the Internal Revenue Code against such claims, also outside the protection of the bankruptcy case." (Docket Entry No. 14, p.4, ¶18).

Plaintiffs both misapply the facts of *Taylor* and skew the policy on which it is based. In *Taylo*r, the taxpayer/debtor filed a disclosure statement and proposed plan of reorganization in the bankruptcy court, stating that he owed no tax liability. The IRS asserted a claim for unpaid personal income taxes. Taylor objected, and the IRS subsequently withdrew its claim. However, the IRS asserted no claim in the bankruptcy proceeding for any other tax liability, including taxes under section 6672. The bankruptcy court approved Taylor's plan of reorganization. The IRS received a copy of the plan, but did not participate in the confirmation hearing and did not appeal the confirmation order. A few months later, the IRS began proceedings to assess penalties under section 6672. *Taylor*, 132 F.3d at 259. The Fifth Circuit held that the order confirming the plan did not bar the IRS

from collecting the penalty it sought. *Id.* at 259-260. The court emphasized that the "IRS has the option to remain outside the bankruptcy proceedings and preserve a debt for a § 6672 penalty without filing a claim in Chapter 11." *Id.* at 261. Section 1141(d)(2) "saves debts excepted from discharge under § 523 from the general discharge of all pre-existing debts given to the debtor by § 1141(d)(1). . . . The debts excepted from discharge by § 523 include taxes described in § 507(a)(8) 'whether or not a claim for such tax was filed or allowed.' " *Id.* The Fifth Circuit concluded that the IRS's claim for the section 6672 penalty would survive bankruptcy even if the IRS filed no proof of claim in the bankruptcy court. The IRS was free, as a holder of non-dischargeable debt, to pursue the debtor outside bankruptcy.

The Fifth Circuit emphasized that the taxpayer, Taylor, could have asked the bankruptcy court to determine the amount of the penalty at issue. *Id.* at 262. Under 11 U.S.C. § 505, either a debtor or the IRS may file a motion asking the bankruptcy court to determine the amount of contested tax liability. Procedurally, the debtor or the IRS may make a motion under Bankruptcy Rule 9014, or the debtor may file a proof of claim on behalf of the IRS and object to it. *See* FED. R. BANKR. P. 9014; 11 U.S.C. § 501(c). Taylor used neither mechanism to raise the tax liability in the bankruptcy court. Instead, Taylor failed to invoke the power of the bankruptcy court to determine the tax penalty at issue. Taylor's self-serving statement on his schedules, disclosure statement, and plan, that he did not owe any tax liabilities or penalty to the IRS, did not make the bankruptcy court's order confirming the plan *res judicata* of the tax penalty. The fact

that the IRS had filed a proof of claim for income taxes, then abandoned it, did not affect the IRS's ability to proceed against Taylor to collect a tax penalty, which is a separate debt and separate type of tax. The court concluded that the IRS could continue to collect the penalty outside the bankruptcy court.

In this case, by contrast to *Taylor*, the IRS did file and pursue proofs of claim in the bankruptcy court for the taxes at issue. In *Taylor*, the IRS did not do so. In this case, the IRS filed proofs of claim and objections to the debtors' proposed plan of reorganization, and plaintiffs amended their proposed plan of reorganization to provide for the payment of the taxes. In *Taylor*, neither the plaintiff nor the IRS invoked the bankruptcy court's power to determine the amount of the tax liability. In this case, both the IRS and the taxpayer/debtor litigated the tax liability in the bankruptcy court.

In *Taylor*, the bankruptcy court approved a plan that did not recognize any debt to the IRS; the existence and amount of the debt was not litigated. In this case, the bankruptcy court approved a plan that specifically recognized the plaintiffs' debt to the IRS for specific tax liabilities and required payment. In *Taylor*, the IRS chose not to pursue the taxpayer in the bankruptcy court, and the taxpayer did not invoke the power of the bankruptcy court to litigate the disputed tax; the IRS could pursue the tax debt outside bankruptcy. In this case, the IRS did choose to litigate the tax liability in the bankruptcy court, and the bankruptcy court resolved the tax liability in its final judgment on the merits; the Pucketts cannot relitigate the issue by pursuing this tax refund lawsuit.

Plaintiffs' policy argument does not blunt the effect of the distinctions between *Taylor* and this suit. Plaintiffs argue that it is unfair to allow the IRS the option of litigating tax liability in bankruptcy court or in a different forum, without allowing the taxpayer the same flexibility. However, the Fifth Circuit made it clear that "[t]he IRS's ability to remain outside the bankruptcy proceeding is a product of Congress's policy decision to elevate the goal of revenue collection above the debtor's interest in a fresh start after bankruptcy." *Taylor*, 132 F.3d at 263; *see also In re Fein*, 22 F.3d 631, 633 (5th Cir. 1994) ("Congress consciously opted to place a higher priority on revenue collection than on debtor rehabilitation or ensuring a 'fresh start.' "). Courts have refused to bar subsequent litigation on the grounds of claim preclusion only when a secured creditor or the IRS brings a post- confirmation suit and the debtor raises claim preclusion as a defense. *See, e.g., Taylor*, 132 F.3d at 256; *Fein*, 22 F.3d 631 (finding no claim preclusion as to the IRS's priority tax claim); *In re Simmons*, 765 F.2d 547 (5th Cir. 1985) (finding that a secured lien survives bankruptcy despite the plan's classification of the lien as unsecured); *see also Holywell Corp. v. Smith*, 503 U.S. 47 (1992) (finding that failure to object to confirmation of plan did not preclude the United States from collecting taxes from a trustee).

As to the fourth requirement of claim preclusion, the Fifth Circuit has adopted the transactional test of the *Restatement (Second) of Torts* § 24 to determine whether "two complaints involve the same cause of action." *Eubanks v. FDIC*, 977 F.2d at 171; *Lee*, 901 F. Supp. at 1222 (citing *Agrilectric*, 20 F.3d at 665). "Under this approach, the critical issue is not the relief requested or the theory asserted but

whether the plaintiff bases the two actions on the same nucleus of operative facts." *Agrilectric*, 20 F.3d at 665 (quoting *In re Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990)). "If the factual scenario of the two actions parallel, the same cause of action is involved in both." *Id.* "[T]he relevant inquiry is whether the same facts underlie the various legal theories asserted." *Lee*, 901 F. Supp. at 1222 (citing *Jarmon v. Houston Indep. Sch. Dist.*, 805 F. Supp. 24, 26 (S.D. Tex. 1992)).

Plaintiffs argue that the refund claims "arise primarily from . . . deductions which were not originally included on the pre-petition and pre-confirmation tax returns." (Docket Entry No. 14, p.2, ¶7). However, plaintiffs do not argue that they were prevented from including those deductions on the tax returns at issue. The fact that plaintiffs did not include the deductions on the pre-petition and post-petition tax returns does not mean that refund claims based on the deductions arise from separate and distinct transactions. The nucleus of operative facts in both the bankruptcy case and in this case consists of the facts giving rise to the tax liability for the 1985-1988 tax years. Plaintiffs' failure to include the deductions that they now assert on the appropriate tax returns does not create new transactions that would avoid claim preclusion.

All four requirements of claim preclusion are present in this case. The parties are identical in both actions. The confirmed plan in the bankruptcy court is a final judgment on the merits rendered by a court of competent jurisdiction. The same cause of action is involved in both suits. Claim preclusion bars plaintiffs from bringing their claim for tax

refunds, which were previously ruled upon in the bankruptcy court's order confirming the amended plan of reorganization. The United States' motion to dismiss is GRANTED.

III. Conclusion

Plaintiffs' motion to strike is DENIED. The United States' motion to dismiss is GRANTED. This case will be dismissed by separate order.

SIGNED on June 22, 1999, at Houston, Texas.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-98-1788

GEORGE C. PUCKETT, JR. and
MARTHA SUE PUCKETT,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

In accordance with the court's Memorandum and Opinion of even date, this action is DISMISSED with PREJUDICE. Plaintiffs are to bear the costs of court.

This is a final judgment.

SIGNED on June 22, 1999, at Houston, Texas.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 12, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20697

GEORGE C PUCKETT, JR; MARTHA SUE PUCKETT

Plaintiffs – Appellants

v.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before KING, Chief Judge, and REAVLEY and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
CHIEF JUDGE

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

(2)

No. 00-458

In the Supreme Court of the United States

GEORGE C. PUCKETT, JR. AND MARTHA SUE PUCKETT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

PAULA M. JUNGHANS
Acting Assistant Attorney General

FRANK P. CIHLAR
TERESA T. MILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12pp

QUESTION PRESENTED

Whether res judicata bars petitioners from bringing a tax refund suit with respect to tax liabilities adjudicated in a bankruptcy proceeding.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Baker v. *General Motors Corp.*, 522 U.S. 222 (1998)	6
Balbirer v. *Austin*, 790 F.2d 1524 (11th Cir. 1986)	6
Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981)	7
Fein, In re v. *United States*, 22 F.3d 631 (5th Cir. 1994)	4, 5
Gurwitch, In re, 794 F.2d 584 (11th Cir. 1986)	4, 5
Migra v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 70 (1984)	6
Rivet v. *Regions Bank of La.*, 522 U.S. 470 (1998)	7
Taylor, In re, 132 F.3d 256 (5th Cir. 1998)	4, 5

Statutes:

Internal Revenue Code (26 U.S.C.):	
§ 6511(d)(2)(B)(iii)	8
§ 6672	5
11 U.S.C. 503(b)(1)(B)	4
11 U.S.C. 507(a)(7)	4
11 U.S.C. 523	4
11 U.S.C. 523(a)(1)(A)	5
11 U.S.C. 1129(a)(9)	4
11 U.S.C. 1141(d)(1)	4
11 U.S.C. 1141(d)(2)	4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unpublished, but the decision is noted at 213 F.3d 636 (Table). The opinion of the district court (Pet. App. 11a-27a) is reported at 82 F. Supp. 2d 660.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. A timely petition for rehearing was denied on June 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed a Chapter 11 bankruptcy petition in July 1987. The Internal Revenue Service filed proofs of claim for unpaid income taxes due from petitioners for the 1985-1990 tax years. Pet. App. 2a.[1] After several amendments, petitioners' bankruptcy plan was confirmed on April 2, 1991. The plan provided for payment of the entire amount of the government's tax claims. Pursuant to the plan, the tax claims were paid by petitioners on June 30, 1992. *Id.* at 2a-4a.[2]

On June 30, 1994, petitioners filed claims for refund of the tax payments made for their 1985-1988 tax years. Petitioners asserted (i) that their tax liability for 1985 should be reduced by application of a net operating loss carryforward from the 1984 tax year and (ii) that their tax liabilities for 1987 and 1988 should be reduced by application of a net operating loss carryback from the 1989 tax year. Pet. App. 4a.[3]

2. After the Service denied these claims for refund, petitioners brought this refund suit in district court. The court dismissed the complaint. Pet. App. 11a-27a. The court concluded that petitioners' refund suit is barred by res judicata because the bankruptcy court's

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[1] The Service also included in the proof of claim the unpaid employment taxes owed by a business that petitioners owned. Only the income taxes for the 1985-1988 tax years are at issue here.

[2] The payment petitioners made on June 30, 1992, fully satisfied their tax liabilities but did not pay all of the interest and penalties allowed under the plan. The plan specifically provided that the Service could assess and collect those amounts outside the bankruptcy proceeding. Pet. App. 2a-4a.

[3] These refund claims also asserted an entitlement to additional business deductions for the 1985-1988 tax years. Petitioners abandoned that issue in the court of appeals. Pet. App. 4a n.2.

orders constituted a final adjudication of petitioners' tax liabilities for these years. *Id.* at 26a. The court rejected petitioners' assertion that the confirmation of their bankruptcy plan was not a final determination of their liability for nondischargeable tax debts. The court concluded that petitioners' tax refund suit—which contests their liability for tax—is not a separate claim for relief from the matters adjudicated by the bankruptcy court in allowing the government's proof of claim for those same taxes. *Id.* at 21a-26a.

3. The court of appeals affirmed with a *per curiam* opinion. Pet. App. 1a-10a. The court of appeals agreed with the district court that all four conditions for application of the doctrine of res judicata are present in this case: (i) the parties to the two actions are the same; (ii) the judgment in the bankruptcy case was issued by a court of competent jurisdiction; (iii) the confirmation of the bankruptcy plan constituted an adjudication on the merits of petitioners' 1985-1988 tax liabilities; and (iv) petitioners' suit for a refund of taxes for the 1985-1988 tax years represented the same cause of action presented in, and determined by, the bankruptcy court. *Id.* at 6a-7a.

The court of appeals rejected petitioners' argument that the present case constituted a new cause of action because of their reliance there on issues (net operating loss claims) not raised by petitioners in the bankruptcy court. The court noted that petitioners could have asserted the net operating loss claims in response to the proofs of claim filed by the government in bankruptcy court. The court concluded that allowing petitioners to raise these claims in this untimely manner would improperly "grant [them] an unjustified opportunity to relitigate their tax liability." Pet. App. 8a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly determined that the confirmation of petitioners' bankruptcy plan constituted a final adjudication of the tax liabilities that petitioners seek to challenge in their tax refund suit, and that the refund suit is therefore barred by res judicata. Petitioners err in contending (Pet. 8) that the confirmation of a plan does not fix the amount of tax liabilities for tax debts that are not dischargeable by the plan.[4] They mistakenly argue that the decisions in *In re Gurwitch*, 794 F.2d 584 (11th Cir. 1986), *In re Fein* v. *United States*, 22 F.3d 631 (5th Cir. 1994), and *In re Taylor*, 132 F.3d 256 (5th Cir. 1998), support their posi-

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[4] 11 U.S.C. 1141(d)(1) provides generally that the confirmation of a bankruptcy plan discharges pre-existing debts. 11 U.S.C. 1141(d)(2) carves out an exception from discharge, however, for debts identified in 11 U.S.C. 523. Under 11 U.S.C. 523, tax debts afforded priority under 11 U.S.C. 507(a)(7) are not discharged. In turn, 11 U.S.C. 507(a)(7) provides priority for taxes that were due within the three-year period prior to the filing of the bankruptcy petition. Petitioners' bankruptcy petition was filed on July 8, 1987. Their taxes for 1985 and 1986 were due on April 15, 1986, and April 15, 1987, respectively. The taxes due for those years were therefore entitled to priority treatment under 11 U.S.C. 507(a)(7), and they are therefore nondischargeable under 11 U.S.C. 1141(d)(2).

Petitioners' tax liabilities for 1987 and 1988, however, were due after the filing of their bankruptcy petition. Those taxes are therefore treated as administrative expenses under 11 U.S.C. 503(b)(1)(B). As administrative expenses, those taxes are not excepted from discharge because, under 11 U.S.C. 1129(a)(9), a bankruptcy plan cannot be confirmed unless it provides for full payment of such claims.

tion on this issue. Although each of those cases concerned the application of res judicata to proceedings following a bankruptcy case, the issue they address is distinct from the question presented in this case.

The taxpayers in *Gurwitch*, *Fein*, and *Taylor* claimed that the government was barred from collecting certain taxes after the close of their bankruptcy proceedings because those taxes had been put in issue in the bankruptcy court by their inclusion in the confirmed bankruptcy plan.[5] These courts concluded that the confirmation of a plan of reorganization does not bar the government from asserting additional nondischargeable tax liabilities outside of the bankruptcy proceedings because the Bankruptcy Code expressly specifies that "these taxes are nondischargeable 'whether or not a claim for such tax was filed or allowed.'" *Gurwitch*, 794 F.2d at 585 (quoting 11 U.S.C. 523(a)(1)(A)). See also *In re Taylor*, 132 F.3d at 262; *In re Fein*, 22 F.3d at 633. None of those cases supports the diametrically opposite contention of petitioners—that, notwithstanding petitioners' acquiesence in unopposed allowance of the government's tax claims in the confirmed bankruptcy

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[5] In *Gurwitch*, the government filed a proof of claim that was allowed and paid under the terms of the debtor's plan. When the government later sought to collect additional taxes, the taxpayer claimed that the amount provided for in his plan was conclusive. 794 F.2d at 585. In *Taylor*, the government sought to collect penalties from the taxpayer under 26 U.S.C. 6672. The taxpayer claimed that the government was barred from collecting because the government did not object when the proposed reorganization plan listed a liability for amounts due under 26 U.S.C. 6672 and provided for no payment. 132 F.3d at 259. In *Fein*, the taxpayer asserted that the confirmation of his bankruptcy plan finally determined that he had no liability for taxes because he gave the government notice of his bankruptcy proceeding and no proof of claim was filed. 22 F.3d at 632.

plan, the taxpayer may relitigate the amount of those liabilities in subsequent refund proceedings.

2. Petitioners also err in asserting (Pet. 11-12) that the decision in this case conflicts with *Balbirer* v. *Austin*, 790 F.2d 1524 (11th Cir. 1986). *Balbirer* involved issue preclusion or collateral estoppel rather than claim preclusion or res judicata. Under the doctrine of collateral estoppel, a litigant is precluded from further litigation only of the issues that were actually litigated and necessarily determined in the prior proceeding. See, *e.g.*, *Baker* v. *General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998) (under principles of collateral estoppel, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim"); *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n. 1 (1984). In *Balbirer*, creditors sought relief in a bankruptcy proceeding by requesting the bankruptcy court to determine that a certain debt owed to them was nondischargeable because it arose from misrepresentations made by the debtor. 790 F.2d at 1525. A prior action for damages resulting from the debtor's misrepresentation had been dismissed with prejudice, however, and the debtor asserted that further litigation of the misrepresentation issue was precluded by principles of collateral estoppel. *Ibid.* The bankruptcy court and the district court agreed with the debtor, but the court of appeals reversed and remanded for a determination whether the parties to the Illinois action had intended the dismissal to serve as an adjudication on the merits of the misrepresentation claim. *Id.* at 1528. The court concluded that only the issues "actually * * * resolved by [the prior] judgment" would operate as an estoppel to preclude their litigation in a subsequent case. *Ibid.*

Unlike *Balbirer*, the present case involves claim preclusion, not issue preclusion. Petitioners are therefore wide of the mark in asserting that the court of appeals failed in this case to consider whether certain issues raised in the tax refund suit (in particular, the carryforward and carryback of net operating losses) had been addressed in the bankruptcy proceeding. Although principles of collateral estoppel would not preclude consideration of those issues if they had not been actually resolved in the prior proceeding, the doctrine of res judicata precludes relitigation of their entire claim for the years addressed in the prior case. As this Court has explained, "[u]nder the doctrine of claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 476 (1998) (quoting *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981)). Because a final determination of petitioners' 1985-1988 income tax liabilities was made in the bankruptcy court, and because petitioners could have raised any issues relating to their tax liabilities for that year prior to that determination, the doctrine of res judicata now bars them from raising and relitigating claims pertaining to those years.[6]

3. Finally, petitioners claim (Pet. 12) that regardless of the effect that res judicata might have on other claims, it has no effect on their claims concerning

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[6] Petitioners' bankruptcy plan was confirmed in 1991. The facts concerning the possible application of a net operating loss carryforward and net operating loss carrybacks to their 1985-1988 tax years were established prior to 1991 and therefore could have been asserted in the bankruptcy court. Pet. App. 8a.

the carryforward and carryback of net operating losses. They rely for this argument on 26 U.S.C. 6511(d)(2)(B)(iii), which generally provides a special period of limitation for refund claims for tax years that are affected by net operating loss adjustments in subsequent years.

In the first place, the court of appeals properly noted that petitioners had waived this argument by failing to raise it "before the district court." Pet. App. 9a. The court declined to exercise its discretion to reach this issue, and petitioners offer no reason why that exercise of discretion would warrant review by this Court. Moreover, as the court of appeals explained (*id.* at 8a):

> [Petitioners] do not contend that they were unable to bring their claim to reduce their 1985, 1987, and 1988 tax liability by applying carryover and carryback [net operating losses] before the bankruptcy court. Our review of the record * * * indicates that they had ample opportunity to do so. There is no allegation in the record that the facts from which the existence of the 1984 and 1989 [net operating losses] were determined were not available to the Pucketts at the time that the IRS filed its amended proof of claim in 1991. In fact, the Pucketts had themselves ascertained that they had suffered a loss in 1984, and declared it on their timely-filed 1984 tax return.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

PAULA M. JUNGHANS
Acting Assistant Attorney General

FRANK P. CIHLAR
TERESA T. MILTON
Attorneys

NOVEMBER 2000